Usman bin Ahmad v Chin Brothers Construction Co

HIGH COURT (SHAH ALAM) — CIVIL SUMMONS NO MT2–12–218 OF 1997
ABU SAMAH J
21 JUNE 2000

Civil Procedure *— Affidavits — Affidavit in reply — Whether filed and served out of time—Whether further affidavit was filed and served out of time — Whether appellant's conduct in filing a further affidavit without making known his intention to raise a preliminary objection had waived his right to object to respondent's affidavit in reply — Subordinate Courts Rules 1980, O 24 r 4(2)(a) and (b)*

On 18 September 1997, the appellant (plaintiff) filed a notice of application to amend his statement of claim with an affidavit in support thereof. An unsealed copy of the application together with the affidavit in support was served on the respondent on 19 September 1997 and on 21 October 1997, the sealed copy of the application with the affidavit in support was served on the respondent (defendant). The respondent filed and served an affidavit in reply on 4 November 1997 on the appellant and the appellant served a further affidavit on the respondent on 20 November 1997. On the same day, each party served a written notice of preliminary objection, objecting to the other's affidavit on the ground that it was filed out of time in contravention of O 24 r 4(2)(a) and (b) of the Subordinate Court Rules 1980 ('SCR'). The appellant submitted that the 14 day period should run from the date of service of the unsealed copy of the application and the affidavit in support. The appellant also pointed out that the Court of Appeal case of *Perbadanan Nasional Insurans Sdn Bhd v Pia Lai Ong* [1996] 3 CLJ 321 was decided differently in that the 14 day period under O32 r 13(2)(b) of the Rules of the High Court 1980 (which is in pari materia with O 24 r 4(2)(b) of the SCR) started from the date of service of the sealed copy of the summons and affidavit in support. The respondent submitted that the appellant by filing a further affidavit without making known his intention to raise a preliminary objection, had waived his right to object to the respondent's affidavit in reply. The sessions court judge dismissed the appellant's preliminary objection to the affidavit in reply by the respondent and allowed the respondent's preliminary objection to the appellant's further affidavit, in reply to the respondent's affidavit in reply. The appellant appealed.

Held, dismissing the appeal:

(1) The court had considered both conflicting decisions carefully and was of the view that the decision in *Perbadanan National Insurans Sdn Bhd* was preferable to that of *Structural Concrete Sdn Bhd*. On the facts, the appellant served the sealed copy of the application and its supporting affidavit on the respondent on 21 October 1997. The respondent filed and served its affidavit in reply on

4 November 1997. This was well within the 14 days period as prescribed by O 24 r 4(2)(b) of the SCR (see p 287B–C). *Sarawak Electricity Supply Corporation v M S Shipping Sdn Bhd* [1997] 1 CLJ 300 distinguished.

(2) The court was also of the view that O 24 r 4(2)(b) of the SCR applies to subsequent affidavits. The very wording of the said Order seems to suggest that it is not restricted to the first affidavit-in-reply only. If it is, it defeats the very purpose it seeks to achieve, namely to prevent any last minute afidavits being filed so as to protract the hearing of any proceeding in chambers, since thereafter, the parties, being freed from the time constraint, could file subsequent afidavits as and when they deemed fit. As a result, the appellant's further affidavit which was filed and served out of the 14 days period, ought to be rejected. No application was made before the learned sessions court judge, for an abridgment of time (see p 287F–G).

(3) On the issue of the waiver, the court was of the view that the appellant's conduct was contradictory. He filed and served a further affidavit, in reply to the respondent's affidavit in reply and yet on the very day itself gave notice of preliminary objection that the respondent's affidavit in reply was served out of time. Why did the appellant file and serve a further affidavit, without deposing therein of his intention to raise a preliminary objection, when he knew and intended to object to the respondent's affidavit in reply? In the court's view, the appellant had, by his own conduct, waived his right to raise the preliminary objection that the respondent's affidavit in reply was served out of time (see p 288D–E).

[Bahasa Malaysia summary

Pada 18 September 1997, perayu telah memfailkan notis permohonan untuk meminda pernyataan tuntutannya bersama dengan afidavit sokongan. Sesalinan permohonan yang tidak dimeteraikan, berserta dengan afidavit sokongannya, disampaikan ke atas responden pada 19 September 1997, dan salinan yang dimeteraikan berserta dengan afidavit sokongan telah disampaikan pada 21 Oktober 1997. Responden telah pada 4 November 1997 memfailkan dan menyampaikan sesalinan afidavit jawapan ke atas perayu, dan perayu pula telah menyampaikan afidavit lanjutan ke atas responden pada 20 November 1997. Kedua-dua pihak telah menyampaikan notis bantahan permulaan pada hari yang sama kerana afidavit pihak yang lain difailkan di luar jangka masa bertentangan dengan A 24 k 4(2)(a) dan (b) Kaedah-Keadah Mahkamah Rendah 1980 ('KMR'). Perayu menghujahkan bahawa tempoh 14 hari sepatutnya bermula dari tarikh penyampaian salinan permohonan yang tidak dimeteraikan dan afidavit sokongan. Perayu juga telah mengutarakan bahawa kes Mahkamah Rayuan *Perbadanan Nasional Insurans Sdn Bhd v Pia Lai Ong* [1996] 3 CLJ 321 mempunyai keputusan yang berlainan, iaitu

Mahkamah telah memutuskan bahawa tempoh masa 14 hari di bawah A 32 k 13(2)(b) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') (yang serupa dengan A 24 k 4(2)(b) KMR) bermula dari tarikh penyampaian salinan saman yang dimeteraikan bersama dengan afidavit sokongan. Responden menghujahkan bahawa perayu telah, dengan memfailkan afidavit lanjutannya dengan tidak memberitahu niatnya untuk membangkitkan bantahan permulaan, mengetepikan haknya untuk membantah terhadap afidavit jawapan responden. Hakim mahkamah sesyen telah menolak bantahan permulaan perayu terhadap afidavit jawapan responden dan telah membenarkan bantahan permulaan responden terhadap afidavit lanjutan perayu. Perayu merayu.

Diputuskan, menolak rayuan tersebut:

(1) Mahkamah telah mempertimbangkan kes-kes yang mempunyai keputusan yang bertentangan dan berpendapat bahawa kes *Perbadanan Nasional Insurans Sdn Bhd* adalah lebih sesuai berbanding dengan kes *Structural Concrete Sdn Bhd*. Pada faktanya, perayu telah menyampaikan salinan permohonan yang dimeteraikan dan afidavit sokongannya ke atas responden pada 21 Oktober 1997. Responden telah memfailkan dan menyampaikan afidavit jawapannya pada 4 November 1997 dan ia berada di dalam tempoh masa 14 hari seperti yang ditetapkan di dalam A 24 k 4(2)(b) KMR (lihat ms 287B–C); *Sarawak Electricity Supply Corporation v M S Shipping Sdn Bhd* [1997] 1 CLJ 300 dibeza.

(2) Mahkamah berpendapat bahawa A 24 k 4(2)(b) KMR digunakan untuk afidavit yang berikutnya. Susunan kata Aturan tersebut mencadangkan bahawa ia tidak terhad kepada afidavit jawapan yang pertama sahaja. Jikalau ia terhad, ini akan menggagalkan tujuan asal yang hendak dicapai, iaitu untuk menghalang pemfailan afidavit-afidavit pada saat-saat yang terakhir yang boleh melanjutkan prosiding dalam kamar, kerana parti-parti yang berkenaan boleh memfailkan afidavit-afidavit berikutnya sesuka hati. Oleh itu, afidavit lanjutan perayu yang difailkan di luar jangka masa 14 hari ditolak. Tiada permohonan untuk perlanjutan masa yang telah dibuat dihadapan hakim sesyen (lihat ms 287F–G).

(3) Berkenaan dengan isu penepian, Mahkamah berpendapat bahawa kelakuan perayu bercanggah. Beliau telah memfailkan dan menyampaikan afidavit lanjutannya, menjawab afidavit jawapan responden dan telah pula pada hari itu memberi notis bantahan permulaan mengatakan bahawa afidavit jawapan responden difailkan di luar jangka masa 14 hari. Kenapa perayu memfailkan dan menyampaikan afidavit lanjutannya tanpa memberitahu niatnya untuk membangkitkan bantahan permulaan, walhal beliau berniat mambantah terhadap afidavit jawapan responden?

Mahkamah berpendapat bahawa perayu, melalui kelakuannya sendiri, telah menepikan haknya untuk membangkitkan bantahan permulaan (lihat ms 288D–E).]

Notes

For cases on affidavits, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 219–293.

Cases referred to

Dalip Bhagwan Singh v PP [1997] 4 CLJ 645 (refd)
Elite Jewellers Sdn Bhd v Wong Tin Kai [1998] 3 CLJ Supp 115 (refd)
Jasabena Sdn Bhd v Beh Heng Poo & Anor [1985] 1 MLJ 394 (refd)
Mainah Suratman v Rozinah Nizaruddin [1995] 5 CLJ 234 (refd)
Majlis Daerah Dungun v Tenaga Nasional Bhd [1998] 1 MLJ 708 (refd)
Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong [1996] 3 CLJ 321 (folld)
Public Bank Bhd v Berjaya Housing Development Sdn Bhd & Ors [1995] 1 CLJ 237 (refd)
Sarawak Electricity Supply Corporation v M S Shipping Sdn Bhd [1997] 1 CLJ 300 (distd)
Structural Concrete Sdn Bhd & Ors v Wing Tiek Holdings Bhd [1997] 1 MLJ 581 (refd)

Legislation referred to

Rules of the High Court 1980 O 24 r 4, O 32 r 13(1), (2), r 13(2)(a), (b)
Subordinate Courts Rules1980 O 24 r 4(2)(a), r 4(2)(b), O 52 r 3(1)

B S Sidhu (*B S Sidhu & Co*) for the plaintiff.
Varghese (*Jaffar & Menon*) for the defendant.

Abu Samah J. :

This is an appeal by the appellant/plaintiff ('the appellant') against the decision of the learned sessions court judge, Ampang, Selangor given on 2 December 1997 in respect of the following orders:

(i) dismissing the appellant's preliminary objection to the affidavit in reply by the respondent/defendant ('the respondent') which was filed and served out of time, in breach of O 24 r 4(2)(a) and (b) of the Subordinate Courts Rules 1980 ('SCR'); and

(ii) allowing the respondent's preliminary objection to the appellant's further affidavit, in reply to the respondent's affidavit in reply, which was served out of time in breach of O 24 r 4(2)(b) of the SCR.

The facts

On 18 September 1997, the appellant filed a notice of application to amend his statement of claim together with an affidavit in support thereof. On 19 September 1997, the appellant served an unsealed copy of the application together with the affidavit in support thereof on the respondent. On 21 October 1997, the sealed copy of the application with the affidavit in support was served on the respondent. On 4 November 1997, the respondent filed and served an affidavit in reply on the appellant. On 20 November 1997, the appellant filed and served a further affidavit on the respondent. On the same day, each party served a written notice of preliminary objection, objecting to the other's affidavit on the ground that it was filed out of time in contravention of O 24 r 4(2)(a) and (b) of the SCR.

The preliminary objections

(1) Affidavit in reply by the respondent

Order 24 r 4(2)(a) and (b) of the SCR enacts as follows:

> (2) Except as otherwise provided by these rules–
> (a) an affidavit intended to be used in support of an application must be filed and served on the other party within 14 days from the date of the filing of the application; and
> (b) a party intending to reply an affidavit served on him must file his affidavit and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him.

Order 24 r 4(2)(a) and (b) of the SCR is in pari materia with O 32 r 13(2)(a) and (b) of the Rules of the High Court ('RHC') and as such, authorities in respect of the latter provision may be relied upon in construing the former provision.

The learned counsel for the appellant objected to the respondent's affidavit in reply as it was filed and served outside the 14 days period as prescribed by O 24 r 4(2)(b) of the SCR. It was submitted that the 14 days period should run from the date of service of the unsealed copy of the application and the affidavit in support. It was not disputed that if the time begins to run from the date of the service of the unsealed copy of the application together with the affidavit in support, the respondent's affidavit in reply is out of time, that is, by one day. If the time begins to run from the date of service of the sealed copy of the application and the affidavit in support thereof, the affidavit in reply is within the 14 days period.

The appellant relied on the decision of the Court of Appeal in *Structural Concrete Sdn Bhd & Ors v Wing Tiek Holdings Bhd* [1997] 1 MLJ 581. In that case, the issue was whether the 14 days period, within which an affidavit in reply must be filed and served on the other party, should be computed from the date on which the affidavit intended to be replied was served, or 14 days from the date of service of the sealed copy of the summons in chambers in support of which the affidavit was sworn. If the

14 days period was computed from the date of service of the unsealed copy of the summons and the file copy of the affidavit in support, the affidavit in reply was out of time. It was within time if it was computed from the date of service of the sealed copy of the summons and the affidavit in support thereof. The Court of Appeal held that the 14 days period under O 32 r 13(2)(b) of the RHC commenced from the date of service of the unsealed copy of the summons and the file copy of the affidavit in support.

The learned counsel for the appellant was gracious enough to point out that the Court of Appeal consisting of a different corum, in *Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong* [1996] 3 CLJ 321 held that the 14 days period under O 32 r 13(2)(b) of the RHC started to run from the date of service of the sealed copy of the summons and the affidavit in support thereof. Siti Norma Yaacob JCA at p 330 said:

> Both the summons and affidavit must be filed and served on the other party as required by O 32 r (1) and (2) read together with r 13(1)(a) of the same Order . The right to reply by affidavit is then opened to the other party but this right must be exercised within the 14 days period stipulated by sub-r (2)(b) of O 32 r 13. The issue raised before us is when does time start to run?

The Court of Appeal held that the time started to run from the date of service of the sealed copy of the summons and the affidavit in support thereof. The purpose of serving the unsealed copy of the summons together with the affidavit in support can be nothing more than to give due notice to the respondent of the nature of the application and the grounds supporting the application.

The High Court is thus confronted with two conflicting decisions of the Court of Appeal. Both are equally binding on the High Court. The learned counsel for the respondent urged the court to follow the decision in *Perbadanan Nasional Insurans Sdn Bhd*. In *Elite Jewellers Sdn Bhd v Wong Tin Kai* [1998] 3 CLJ Supp115, Abdul Malik Ishak J, when confronted with a similar situation, preferred the decision in *Perbadanan Nasional Insurans Sdn Bhd*.

The Federal Court in *Dalip Bhagwan Singh v PP* [1997] 4 CLJ 645 held that the courts in the tiers below the Court of Appeal may choose between two conflicting decisions irrespective of the dates of those conflicting decisions. That decision gives the courts subordinate to the superior courts the discretion to make the choice, thus avoiding a possible deadlock or stalemate, without being disrespectful to the superior courts.

I have considered both decisions carefully and with great respect, vis-a-vis O 24 r 4(2)(b) of the SCR. Order 24 r 2(a) enacts that, 'an affidavit ... must be filed and served ...'. Order 52 r 3(1) of the SCR provides that any document filed in the registry in any proceedings must be sealed with a seal showing the date on which the document was filed and any document not required by these rules to be sealed must show the date on which it was filed. In my view, it is the affidavit or a copy of it which is filed in court that must, in law, be served on the other party.

It appears to me that O 24 r 4 of the SCR does not prohibit the parties from serving an unsealed copy of the application together with a supporting affidavit, which is yet to be filed or pending the issue of a filed copy, but such action is outside and not within the ambit of the said provision. It is merely to give an advance notice or to alert the other party of a forthcoming application. Hence, in my view, the decision in *Perbadanan National Insurans Sdn Bhd* is preferable to that of *Structural Concrete Sdn Bhd*. In our case, the appellant served the sealed copy of the application and its supporting affidavit on the respondent on 21 October 1997. The respondent filed and served its affidavit in reply on 4 November 1997. This was well within the 14 days period as prescribed by O 24 r 4(2)(b) of the SCR. *Sarawak Electricity Supply Corporation v M S Shipping Sdn Bhd* [1997] 1 CLJ 300 is distinguishable as it was decided on O 32 r 13(2)(a) and not r 13(2)(b) of the RHC.

(2) Further affidavit by the appellant

It was objected to as it was filed and served out of the 14 days period as prescribed by O 24 r 4(2)(b) of the SCR. That it was filed out of the 14 days period was not in dispute. The appellant's contention was that O 24 r 4(2)(b) of the SCR referred to the first affidavit in reply which must be filed and served within the prescribed period and it did not apply to any subsequent affidavit. *Majlis Daerah Dungun v Tenaga Nasional Bhd* [1998] 1 MLJ 708 was cited as authority for this proposition. With respect, that case is distinguishable as it deals with O 32 r 13(1) of the RHC and not O 32 r 13(2) of the RHC. The learned judge, in the final part of his judgment explained:

> ...whereas in the case before me, it involves the construction of sub-r (1) vis-a-vis sub-r (2) of r 13. Hence the issue of delay need not be considered.

In my view, O 24 r 4(2)(b) of the SCR applies to subsequent affidavits. The very wording of the said Order seems to suggest that it is not restricted to the first affidavit-in-reply only. If it is, it defeats the very purpose it seeks to achieve, namely to prevent any last minute affidavits being filed so as to protract the hearing of any proceeding in chambers, since thereafter, the parties, being freed from the time constraint, could file subsequent affidavits as and when they deemed fit.

As a result, the appellant's further affidavit which was filed and served out of the 14 days period, ought to be rejected. No application was made before the learned sessions court judge, for an abridgment of time.

Waiver

It was submitted that the appellant, by filing a further affidavit without making known his intention therein to raise a preliminary objection, had waived his right to object to the respondent's affidavit in reply on the ground of non-compliance with O 24 r 4(2)(b) of the SCR. In *Jasabena Sdn Bhd v Beh Heng Poo & Anor* [1985] 1 MLJ 394, Edgar Joseph Jr J, in dismissing the preliminary objection said:

> Moreover, the respondents in this case had clearly waived their rights to take preliminary objection by filing affidavits in opposition and failing to give to the applicant prior notice of their intention to raise preliminary objection.

In *Public Bank Bhd v Berjaya Housing Development Sdn Bhd & Ors* [1995] 1 CLJ 237 the High Court overruled the defendant's preliminary objection as they had, by their own conduct in filing the affidavits in reply, waived their right to object to the defects in the plaintiff's affidavit.

In *Mainah Suratman v Rozinah Nizaruddin* [1995] 5 CLJ 234 the respondent's counsel objected to the affidavit in reply affirmed by a valuer and property consultant on the ground that it was served out of time in breach of O 32 r 13(2)(b) of RHC. Yet, in spite of the objection, subsequent affidavits were filed. The High Court held that the further steps taken by the respondent in filing those affidavits clearly showed that the respondent had waived the non-compliance of the Rules of the High Court.

The Court of Appeal in *Structural Concrete Sdn Bhd v Wing Tiek Holdings Bhd* [1997] 1 MLJ 581 at p 586 made the following observation:

> It is to be noted that the issue of late filing will not be a problem unless the adverse party raises an objection. If he does not do so and takes a step in the action, the non-compliance will be regarded as having been waived.

In the instant case, the appellant's conduct was contradictory. He filed and served a further affidavit, in reply to the respondent's affidavit in reply and yet on the very day itself gave notice of preliminary objection that the respondent's affidavit in reply was served out of time. Why did the appellant file and serve a further affidavit, without deposing therein of his intention to raise a preliminary objection, when he knew and intended to object to the respondent's affidavit in reply? In my view, the appellant had, by his own conduct, waived his right to raise the preliminary objection that the respondent's affidavit in reply was served out of time.

For the above reasons, the appeal is dismissed with costs.

Appeal dismissed with costs.

Reported by Chew Phye Ken